ORAL ARGUMENT SCHEDULED FOR APRIL 15, 2003

No. 02-7057

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COVAD COMMUNICATIONS CO. and DIECA COMMUNICATIONS, INC.,
d/b/a COVAD COMMUNICATIONS CO.,
Plaintiffs-Appellants,

v.

BELL ATLANTIC CORPORATION, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICI CURIAE SUPPORTING NEITHER PARTY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants Covad Communications Company, et al.

Defendants-Appellees. The following are listed in this court's docket:

Telesector Resources Group, Inc.
Bell Atlanta Internet Solutions, Inc.
Bell Atlantic-West Virginia, Inc.

Appellees. The following are listed in this court's docket:

Communications Workers of America
Arthur Andersen LLP

Amici Curiae for Appellant. The following are listed in this court's docket:

Z-Tel Communciations, Inc.
Corecomm Holdco, Inc.
AT&T Corporation
Association for Local Telecommunications Services
Competitive Telecommunications Association
The American ISP Association
State of New York
Cavalier Telephone, LLC

Amici Curiae for Appellee. The following are listed in this court's docket:

BellSouth Corporation
SBC Communications Inc.
United States Telecom Association

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellants Covad Communications Company, et al.

(C) **Related Cases.** This case has not been on review previously before this Court or any other court. We are aware of no related cases that do not appear in the Brief for Appellants Covad Communications Company, et al.

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TABLE OF CONTENTS

Table of Authorities iv

Glossary v

Interest Of The United States And The Federal Communications Commission . . . 1

Statement Of The Issue 2

Statement Of The Case 2

Summary Of Argument 6

Argument 7

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT BAR ANTITRUST CLAIMS ALLEGING THAT AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES VIOLATED SECTION 2 OF THE SHERMAN ACT 7

A. The 1996 Act Did Not Effect an Implied Repeal of the Sherman Act . 7

B. The Regulatory Framework of the 1996 Act Does Not Justify Dismissal of the Complaint 9

II. EXCLUSIONARY OR PREDATORY CONDUCT IS NECESSARY TO ESTABLISH A VIOLATION OF SECTION 2 OF THE SHERMAN ACT 12

A. Neither The Essential Facilities Doctrine Nor Any Other Theory Permits Antitrust Liability Absent Exclusionary Conduct 14

B. The 1996 Act is Fundamentally Remedial, While the Sherman Act Defines Offenses That May Lead to Remedies 19

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999) 14

Advanced Health-Care Services v. Radford Community Hospital, 910 F.2d 139 (4th Cir. 1990) 17

* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) 10, 15, 16, 17, 21

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) 16, 20

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 12

Carribean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) 14, 15

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 15

Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002) 8, 10, 19

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 16

Essential Communications Systems, Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979) 11

General Industries Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987) 17

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) . . . . . *passim*

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) 9

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977) 14

Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc., 924 F.2d 539 (4th Cir. 1991) 21

Authorities upon which we chiefly rely are marked with asterisks.

Law Offices of Curtis V. Trinko v. Bell Atlantic Corp., 294 F.3d 307 (2d Cir. 2002) 8, 10, 11

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983) 9, 11, 15

* *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) 17

Michigan Public Power Agency v. FERC, 963 F.2d 1574 (D.C. Cir. 1992) 14

* *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378 (1981) 8

Neumann v. Reinforced Earth Co., 786 F.2d 424 (D.C. Cir. 1986) 18

Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986) 21

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 10, 11, 12

Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981) 9

Southern Pacific Communications Corp. v. AT&T, 740 F.2d 980 (D.C. Cir. 1984) 14, 20

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993) 15, 16

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 20

Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999) 17

United States v. AT&T, 461 F. Supp. 1314 (D.D.C. 1978) 9

United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) 16

United States v. Griffith, 334 U.S. 100 (1948) 16

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001) 11, 15, 18, 21

United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part and rev'd in part on other grounds*, 253 F.3d 34

(D.C. Cir. 2001) 17

United States v. National Association of Securities Dealers, 422 U.S. 694 (1975) 8

United States v. Terminal R.R. Association of St. Louis, 224 U.S. 383 (1912) 20

United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) 14, 23

Verizon Communications, Inc. v. FCC, 122 S. Ct. 1646 (2002) 7, 19, 22, 24, 25

Statutes and Rules

Section 2 of the Sherman Act, 15 U.S.C. 2 . . . . . *passim*

Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 . . . . . *passim*

§ 251, 47 U.S.C. 251 . . . . . 3, 7, 22
§ 252, 47 U.S.C. 252 . . . . . 3, 24
§ 601(b)(1), 110 Stat. 56, 143 8

Fed. R. Civ. P. 12(b)(6) 11

Fed. R. App. P. 29(a) 2

Fed. R. App. P. 32(a)(7)(B)(iii) 27

Fed. R. App. P. 32(A)(7)(B) and 29(d) 27

Administrative Materials

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696 (1999) 22, 23

47 C.F.R. 51.505 (2001) 24

Other

3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (2d ed. 2002) 16

3A Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (2d ed. 2002) 11, 14, 23

Robert H. Bork, The Antitrust Paradox (1993) 18

GLOSSARY

A__	Appellant's Appendix, at the specified page.
Br.	Opening Brief of Appellants Covad Communications Company, et al.
CLEC	Competitive Local Exchange Carrier.
Compl.	(Corrected) Second Amended Complaint dated July 5, 2001**.**
DSL	Digital Subscriber Line.
ILEC	Incumbent Local Exchange Carrier.
TELRIC	Total Element Long-Run Incremental Cost.

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INTEREST OF THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

The United States has primary responsibility for enforcing the federal antitrust laws. The Federal Communications Commission has primary responsibility for enforcing the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act").[1] The United States and the FCC thus have a mutual interest in ensuring that the Communications Act, including the Congressional determinations in the 1996 Act, and the Sherman Act are properly reconciled. We file pursuant to the first sentence of Fed. R. App. P. 29(a).

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[1]Pub. L. 104-104, 110 Stat. 56.

STATEMENT OF THE ISSUE

The United States and the FCC will address the applicability of both the 1996 Act and Section 2 of the Sherman Act, 15 U.S.C. 2, to allegations that an incumbent local exchange carrier has monopolized or attempted to monopolize a market for local telecommunications services.

STATEMENT OF THE CASE

Covad's Complaint. Appellant Covad's complaint in this case alleged, *inter alia*, that Bell Atlantic violated Section 2 of the Sherman Act by unlawfully "sustain[ing] and enhanc[ing]" monopoly power "through anticompetitive and predatory means . . . to the detriment of consumers and competition." Compl. ¶ 216 (A109).[2] Covad alleged that it "competes or seeks to compete" (*id.* ¶ 53 (A065)) in markets in which Bell Atlantic has monopoly power, specifically, the "Local Internet Access Market," "Local Telecommuting Market" and "Local Voice Services Market" (*id.* ¶ 53 (A065)) in "Bell Atlantic's local services areas" (*id.*) In order to do so, Covad alleged, it requires "dependable, timely and affordable" (*id.* ¶ 64 (A068)) "access to four parts of the local telephone network over which Bell Atlantic exercises total control": central office space, local loops, operations support systems, and transport (*id.* ¶ 63 (A068)), which Covad "cannot reasonably duplicate" (*id.* ¶ 227 (A111)). However, because "Covad's introduction of DSL services threatens

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[2]Covad also alleged various state law violations. Compl. ¶¶ 239-302 (A113-133).

"Compl." refers to the (Corrected) Second Amended Complaint dated July 5, 2001, and filed July 16, 2001. (A047-134). "A" refers to appellants' Appendix.

Bell Atlantic's monopoly power," Bell Atlantic has "use[d] its control over the local telephone facilities to stifle competition from DSL technology." *Id.* ¶ 89 (A075). In support of that assertion, Covad's complaint described in detail Bell Atlantic's alleged noncompliance with duties imposed by the 1996 Act. *See id.* ¶¶ 91-213 (A076-108).

Covad claimed that Bell Atlantic "has denied Covad access to these facilities on fair, reasonable and non-discriminatory terms." *Id.* ¶ 228 (A111). Covad further alleged that Bell Atlantic "feasibly could have granted, and legally was obliged to grant, Covad access to these facilities" (*id.* ¶ 229 (A112)), and that its "denial of access is without legitimate or sufficient business justification" (*id.*). Although Covad and Bell Atlantic entered into an interconnection agreement, as required by Sections 251 and 252 of the 1996 Act, 47 U.S.C. 251, 252 (Compl. ¶ 51 (A064)), Covad alleged, "Bell Atlantic continues to deny Covad access to . . . parts of Bell Atlantic's network that Covad requires to provide its services" (*id.* ¶ 228 (A111)). As a result of Bell Atlantic's actions, Covad alleged, "competition in the relevant markets has been injured, . . . Covad has been damaged" (*id.* ¶ 218 (A109)), and "Bell Atlantic continues to dominate these markets through unlawful conduct, to the detriment of consumers and competition" (*id.* ¶ 216 (A109)).

Covad sought treble damages and other relief. Compl. Prayer for Relief (A133).

Bell Atlantic's Motion to Dismiss. Bell Atlantic moved to dismiss the complaint. Relying on *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000),

Bell Atlantic argued that "Covad's theory of antitrust liability is incompatible with the 1996 Act." Opposition to Plaintiff's Motion for Leave To File Amended Complaint and Memorandum in Support of Defendants' Motion to Dismiss at 9 (Sept. 12, 2000). In response, Covad argued that the 1996 Act's antitrust savings clause conclusively refutes any argument "that the Act immunizes the ILECs from antitrust liability." Plaintiffs' Opposition to Defendants' Motion To Dismiss at 15-17 (Oct. 3, 2000).

The District Court's Order. The district court granted Bell Atlantic's motion and dismissed Covad's complaint. Order (May 3, 2002) (A206). The court acknowledged that the 1996 Act's express savings clauses

> made explicit Congress' intention that the 1996 Act should not in any way alter the application or scope of existing antitrust law. Thus, conduct that was proscribed prior to the 1996 Act remains proscribed after its enactment. Similarly, conduct that did *not* violate antitrust law prior to the 1996 Act does not now violate antitrust law after the Act.

Memorandum Opinion 13 (May 3, 2002) ("Mem.") (A219). The court agreed with the Seventh Circuit that "the 1996 Act contains duties and obligations of affirmative assistance that 'go well beyond anything the antitrust laws would mandate on their own.'" *Id.* at 11 (A217) (quoting *Goldwasser*, 222 F.3d at 400). "Consequently," the court concluded:

> the duties of affirmative assistance set forth in the 1996 Act exist outside the parameters of pre-existing antitrust law. Bell Atlantic's alleged failure to comply with those duties, which is the lion's share of Plaintiffs' Complaint, does not constitute 'exclusionary' conduct as a matter of law, which is the *sine qua non* of any antitrust violation.

Mem. 131 (A218).

The court emphasized that "the essential facility doctrine . . . is a narrow and limited qualification of a firm's right to refuse to deal with its competitors," and that, "in order to prevail under an essential facility theory, Plaintiffs must . . . demonstrate an 'anticompetitive effect.'" *Id.* at 14 (A220). It concluded that Covad had "fail[ed] to state an essential facilities claim" because the regulatory scheme of the 1996 Act precludes the required anticompetitive effect:

> Covad's allegations . . . focus on disputes over the terms for obtaining access to Bell Atlantic's local exchange network--an entitlement that was first created by the 1996 Act (not by the antitrust laws). The particular terms of that statutorily mandated access are now fully regulated by the FCC and state commissions through their oversight and approval of detailed interconnection agreements. In this setting, there can be no significant harm to competition or anti-competitive effect as a matter of antitrust law, as every relevant facet of Bell Atlantic's relationship with Covad is subject to regulation under the 1996 Act, the rulings of the FCC, and the affirmative and active supervision of state public utility commissions charged with the 1996 Act's enforcement.

Id. at 16 (A222). Citing *Goldwasser*, the court also expressed concern about what it deemed "the fundamental incompatibility between the remedial schemes established by the antitrust laws and the 1996 Act." *Id.* at 19 (A225). Because, "most of the Complaint concerns conduct that is committed to the supervision of the FCC and to state public utility commissions[, p]ermitting judicial consideration of these same issues may interfere with the ability of state regulatory agencies and the FCC to carry out their regulatory missions, and could subject ILECs to inconsistent standards of conduct." *Id.* at 19-20 (A225-226).

SUMMARY OF ARGUMENT

The 1996 Act in itself neither expands nor restricts the scope of the antitrust laws. It creates new duties intended to lead to increased competition, but it creates no new *antitrust* duties. Nor does it explicitly or implicitly provide an immunity from the antitrust laws. And while regulation under the 1996 Act may sometimes make unlikely the anticompetitive effects essential to unlawful monopolization, it does not preclude them as a matter of law. Accordingly, to the extent that the district court based its dismissal of Covad's antitrust claims on the regulatory scheme of the 1996 Act, it erred.

Courts should nevertheless treat with considerable caution claims of antitrust violations that rest on violations of obligations under the 1996 Act. Section 2 of the Sherman Act protects the public from predatory or exclusionary conduct, i.e., conduct by a monopolist or would-be monopolist that makes economic sense only because it eliminates competition. The 1996 Act, in contrast, was intended to uproot monopolies whether or not lawfully formed or maintained. Failure to keep separate the requirements of the two statutes risks harm to the purposes of both.

ARGUMENT

I. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT BAR ANTITRUST CLAIMS ALLEGING THAT AN INCUMBENT PROVIDER OF LOCAL TELECOMMUNICATIONS SERVICES VIOLATED SECTION 2 OF THE SHERMAN ACT

A. The 1996 Act Did Not Effect an Implied Repeal of the Sherman Act

The 1996 Act was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers." 1996 Act, pmbl., 110 Stat. 56. *See also Goldwasser,* 222 F.3d at 391 ("bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets"). Congress sought "to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" as "both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service." *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1654 (2002). Thus, Section 251 of the Act, 47 U.S.C. 251, requires all telecommunications carriers to interconnect with other carriers, and specifically requires incumbent local exchange carriers to comply with a series of obligations designed to facilitate entry by competitive local exchange carriers. Although Congress' objective was to foster competition, the duties that the Act imposes on ILECs extend well beyond the requirements of the antitrust laws. *Goldwasser,* 222 F.3d at 401.

Congress specified the proper relationship between the 1996 Act and the federal antitrust laws. The Act includes an antitrust savings clause providing that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Pub. L. No. 104-104, Title VI, § 601(b)(1), 110 Stat. 56, 143. As the district court observed, the 1996 Act does not expand the scope of the antitrust laws, so a violation of the 1996 Act is not necessarily a violation of the antitrust laws. Mem. 13 (A219). *See also Goldwasser*, 222 F.3d at 400. But, as the district court acknowledged, neither does the 1996 Act bar claims that satisfy established antitrust standards. Mem. 13 (A219). This "plain statutory language is sufficient to end [the] inquiry on this matter." *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1281 (11th Cir. 2002). *See Law Offices of Curtis V. Trinko v. Bell Atl. Corp.*, 294 F.3d 307, 327 (2d Cir. 2002) (meaning of the statutory savings clause is "plain on its face" and unambiguous).

Even if Congress had not clearly expressed its intent, well-established law would preclude construing the 1996 Act to effect an implied repeal of the Sherman Act absent "'a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" *Nat'l Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quoting *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975)). The Supreme Court has "refused . . . a blanket exemption" even for heavily regulated industries. *Nat'l Gerimedical*, 452 U.S. at 392. Thus, prior to passage of the 1996 Act, courts uniformly held that the Communications Act did not immunize from the antitrust

laws regulated carriers' denial of access to the local network. *See, e.g., MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1101-04 (7th Cir. 1983); *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 726-35 (9th Cir. 1981); *United States v. AT&T*, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978). Although Congress in 1996 chose to impose requirements on ILECs extending beyond the requirements of the antitrust laws, in pursuit of its goal of eliminating monopolies in local exchange telecommunications, nothing in the 1996 Act suggests a "plain repugnancy," *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975) (internal quotation and citation omitted), between that Act and the antitrust laws, both of which are "competition-friendly," *Goldwasser*, 222 F.3d at 391.

B. The Regulatory Framework of the 1996 Act Does Not Justify Dismissal of the Complaint

Although it acknowledged that "Congress made explicit its intention that the 1996 Act should not in any way alter the application or scope of existing antitrust law," Mem. 13 (A219), the district court relied primarily on the regulatory scheme of the 1996 Act as a reason to dismiss plaintiff's antitrust claims.[3] The court understood Covad to argue primarily that "Bell Atlantic's denial and delay of access to its local network amounts to denial of an 'essential facility' in violation of antitrust law," *id.*, and it held that the complaint failed to state an essential facility claim, *id.* at 16 (A222). The court discussed in general terms the requirements of an

[3]The court based its dismissal of Covad's retaliatory patent claim on Covad's failure to allege an anticompetitive effect. Mem. 21-22 (A227-228). We do not address this claim. *See* note 4 *infra*.

essential facility claim, *id.* at 13-15 (A219-221), but it rested its conclusion on the assertion that the regulatory scheme established by the 1996 Act precludes plaintiff from establishing that the challenged conduct had an anticompetitive effect:

> The particular terms of that statutorily mandated access are now fully regulated by the FCC and state commissions through their oversight and approval of detailed interconnection agreements. In this setting, there can be no significant harm to competition or anti-competitive effect as a matter of antitrust law.

Id. at 16 (A222). The district court distinguished *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), on the grounds that *Aspen* involved an unregulated defendant and the regulatory scheme in *Otter Tail* limited the regulatory agency's power to control the challenged conduct. Mem. at 17-19 (A223-225). Finally, although the point was "not dispositive," the court "[could] not help but note the fundamental incompatibility between the remedial schemes" of the 1996 Act and the antitrust laws. *Id.* at 19 (A225).

To the extent that the court based its dismissal of the complaint on the regulatory scheme established by the 1996 Act, the court erred. As the Second and Eleventh Circuits have held, there is no basis for holding that "a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anticompetitive conduct that happens to be 'intertwined' with obligations established by the 1996 Act." *BellSouth*, 299 F.3d at 1282; *Trinko*, 294 F.3d at 328-31.

The regulatory scheme of the 1996 Act may nevertheless be relevant to Covad's antitrust claims. An antitrust plaintiff must prove that the conduct at issue had an anticompetitive effect and caused antitrust injury, *see United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001), and regulation sometimes prevents such effects. As the Second Circuit recognized in *Trinko*, however, whether "the regulatory process has successfully eliminated the risk of anticompetitive behavior" in the markets at issue is a question of fact, 294 F.3d at 330, rarely appropriate for determination on a motion to dismiss under Rule 12(b)(6).

Moreover, the district court's suggestion, Mem. 16-19 (A222-225), that the existence of regulation particularly counsels against allowing plaintiff to proceed under an essential facilities theory is not consistent with the view of that theory expressed by other courts and commentators. Although, as we explain below, *see* pp. 14-19, *infra*, we take no position on the merits of Covad's essential facilities claim, the theory has not been confined to unregulated firms or facilities. Indeed, it is more likely to be invoked against a regulated monopoly. *See* 3A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 787, at 310 (2d ed. 2002).

Courts must also take account of the regulatory scheme in fashioning appropriate relief if they find antitrust violations. *See, e.g.*, *Otter Tail*, 410 U.S. at 381; *MCI*, 708 F.2d at 1105-06 (citing *Otter Tail*); *Essential Communications Sys., Inc. v. AT&T*, 610 F.2d 1114, 1120-21 (3d Cir. 1979). Clearly antitrust litigation — whether seeking damages or injunctive relief — carries the potential for

inconsistency and conflict with the 1996 Act's regulatory scheme. But there is no reason to presume that application of established antitrust standards in a suit for damages or injunctive relief would necessarily impair enforcement of the 1996 Act or subject incumbent local exchange carriers to inconsistent standards of conduct, and the need to harmonize enforcement of complementary federal statutes is not a proper basis for dismissing a complaint at the pleadings stage. *See Otter Tail*, 410 U.S. at 376-77; *cf. Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 223 (1966) (reversing dismissal of antitrust action and remanding with instructions to stay pending outcome of related proceedings under the Shipping Act).

II. EXCLUSIONARY OR PREDATORY CONDUCT IS NECESSARY TO ESTABLISH A VIOLATION OF SECTION 2 OF THE SHERMAN ACT

Although we believe that the district court erred to the extent that it based its dismissal of Covad's antitrust claims on the regulatory scheme of the 1996 Act, we take no position on the sufficiency of those claims as a matter of antitrust law. Indeed, we see reason for concern that plaintiffs who believe that an ILEC has failed to perform its 1996 Act obligations may routinely seek to transform their grievances into antitrust claims, for which treble damages are available. Courts should view such antitrust claims with considerable caution, focusing precisely on the exclusionary conduct element of the Section 2 offense, because inappropriate use of the antitrust laws could both undermine the competitive process Congress enacted the 1996 Act to create and deter competitive conduct that would benefit consumers.

Covad's suit focuses primarily on its allegations of deficiencies in the manner with which Bell Atlantic has provided Covad with the access to Bell Atlantic's facilities the 1996 Act requires. *See* Opening Brief of Appellants Covad Communications Company, et al., at 1, 9-10, 13, 14 ("Br.").[4] Covad lists various theories that, in its view, support liability, including theories like the essential facilities doctrine, which it presents as free-standing basies of liability under Section 2 of the Sherman Act. *See id.* at 21 (listing "six distinct legal theories": monopolization, attempted monopolization, the essential facilities doctrine, unlawful refusal to deal, monopoly leveraging, and price squeeze). In order to avoid penalizing procompetitive conduct, however, theories like the essential facilities doctrine must be interpreted in light of well established law limiting liability under Section 2 of the Sherman Act to defendants who engage in exclusionary conduct. And such doctrines should not be interpreted to impose *antitrust* duties based solely on the requirements of the 1996 Act. Although both statutes are intended to further the goal of competition, the requirements of the 1996 Act and the requirements of antitrust law rest on different principles.

[4]Covad's allegations related to certain Bell Atlantic advertising and a patent suit filed after Covad filed its complaint in this matter, Br. at 10, 25-26, have no obvious connection to questions of access to Bell Atlantic's facilities. We do not discuss them here.

A. Neither The Essential Facilities Doctrine Nor Any Other Theory Permits Antitrust Liability Absent Exclusionary Conduct

As the district court observed, Covad's primary argument is that "Bell Atlantic's denial and delay of access to its local network amounts to denial of an 'essential facility' in violation of antitrust law." Mem. 13 (A219). The Supreme Court has never adopted the essential facilities doctrine as a basis for liability in a Section 2 case. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) ("an antitrust doctrine that this Court has never adopted"); *see also id.* at 388 (referring to doctrine as matter of "antitrust theory," not antitrust law). The doctrine has been heavily criticized. *See, e.g.*, 3A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 771c, at 173 (2d ed. 2002) ("the essential facility doctrine is both harmful and unnecessary and should be abandoned"). This Court has endorsed the doctrine in dicta but has never found or affirmed Section 2 liability on an essential facilities theory.[5] And it has several times expressed doubts about the doctrine.[6]

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[5] *See Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 993 & n.44 (D.C. Cir. 1977) (error not to instruct jury regarding restrictive covenant allegedly in violation of Section 1 of the Sherman Act on essential facility theory; no instruction requested regarding Section 2); *Southern Pac. Communications Corp. v. AT&T*, 740 F.2d 980, 1008-10 (D.C. Cir. 1984) (affirming judgment for defendants on Section 2 essential facilities claim); *Carribean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087-89 (D.C. Cir. 1998) (affirming dismissal for failure to state a Section 2 essential facilities claim).

[6] *See Mich. Public Power Agency v. FERC*, 963 F.2d 1574, 1580 n.5 (D.C. Cir. 1992) (Silberman, J.) (referring to it as "this rather confused doctrine"); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 n.4 (D.C. Cir. 2002) ("*USTA*") ("scholars have raised very serious questions about the wisdom of the essential

Noting that "[a] monopolist has no general duty to share his essential facility," *Carribean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998), this Court has explained that:

> where there may be such an obligation, the elements of an antitrust claim for denial of access to an essential facility are (1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiffs use of the facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility.

Id. (citing *MCI*, 708 F.2d at 1132-33). In addition, as the district court pointed out, a plaintiff must also "demonstrate an 'anticompetitive effect,'" Mem. 14 (A220) (citing *Microsoft*, 253 F.3d at 58 ("harm to one or more *competitors* will not suffice" (emphasis in original)), and the "[d]efendant's conduct must also lack a legitimate business justification," Mem. 15 (A221) (citing *Aspen*, 472 U.S. at 604-05 (pinpoint citation corrected) (approving jury instruction that refusal to deal does not violate Section 2 if valid business reasons exist for it)).

Section 2 liability based on denial of access to an essential facility (or on any other theory) must satisfy the generally applicable elements of Section 2. Section 2 specifies only two offenses that can be carried out by a firm acting unilaterally, monopolization and attempted monopolization. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (noting that "§ 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so") (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984)).

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facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting").

The offense of monopolization is (1) the willful acquisition or maintenance of monopoly power (2) by the use of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992), quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948); *see also United States v. Alcoa*, 148 F.2d 416, 432 (2d Cir. 1945). Such conduct, which is labeled "exclusionary" or "predatory," *Aspen*, 472 U.S. at 602, must "reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651f, at 83-84 (2d ed. 2002).

Any Section 2 liability based on monopoly leveraging also must meet the exclusionary conduct requirement (as well as the other elements of monopolization or attempted monopolization, *see Spectrum Sports*, 504 U.S. at 459). Some misread old formulations of monopoly leveraging theory (use of monopoly power to gain a competitive advantage, *see* Br. 31, *Griffith*, 334 U.S. at 107; *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979)) to eliminate the requirement of exclusionary conduct. However, neither *Griffith* nor *Berkey* supports such a reading. *Griffith* concerned the use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition," and it was the extraction of privileges that was found problematic. 334 U.S. at 103-04. *Berkey*, building on *Griffith*, made clear that it is traditional exclusionary techniques that offend the Sherman Act, *see* 603 F.2d at 274 ("predatory pricing, lease-only policies, and exclusive buying arrangements, to list a few"), not all uses of monopoly power.

Exclusionary conduct, the Supreme Court has explained, is conduct that "'not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Aspen,* 472 U.S. at 605 n.32, quoting 3 Phillip Areeda & Donald F. Turner, Antitrust Law ¶ 626b, at 78 (1978). Courts routinely define exclusionary or predatory conduct as conduct that would not make economic sense unless it eliminated competition. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986).[7] These requirements ensure that unlawful monopolization is not found on the basis of economically efficient, procompetitive conduct.

This Circuit's most recent major Section 2 case confirms this understanding. The *Microsoft* district court found Section 2 liability on exactly this basis:

> If the defendant with monopoly power . . . incurred . . . costs . . . with no prospect of compensation other than the erection or preservation of barriers against competition by equally efficient firms, the Court may deem the defendant's conduct 'predatory.'

United States v. Microsoft Corp., 87 F. Supp. 2d 30, 38 (D.D.C. 2000), *aff'd in part and rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001). The court relied on this Court's prior analysis of predation:

> [P]redation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command

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[7] *See also Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524 & n.3 (5th Cir. 1999); *Advanced Health-Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987).

> monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986) (Bork, J.), quoted at 87 F. Supp. 2d at 38; *accord* Robert H. Bork, The Antitrust Paradox 144-45 (1993) (noting that, in any realistic theory of predation, the predator views its costs of predation as "an investment in future monopoly profits").

The conduct before this Court when it considered Microsoft's liability for monopolization on appeal was entirely conduct that the district court had found to be predatory under this standard. Microsoft argued that some of this conduct was nevertheless justified on various grounds, and the Court considered whether, in light of Microsoft's arguments, liability could be found on the basis of that conduct. *See Microsoft*, 253 F.3d at 60-77. There was, therefore, no need for the Court to refer explicitly to this established concept of predation, although the Court implicitly did so by restricting unlawful conduct to conduct that "harm[s] the competitive *process*." *Id.* at 58

Thus, if Section 2 liability is to be imposed on the basis of a denial of access to an essential facility, all of the established requirements of Section 2 must be satisfied. Treating denial of access to an essential facility, monopoly leveraging, and the like as antitrust offenses in their own right — separate from the statutory offenses of monopolization and attempted monopolization — risks imposing Section 2 liability based on the needs of the rival, on simple breach of contract, or on

departure from the standards of law other than the antitrust laws, despite the absence of exclusionary or predatory conduct by the dominant firm.

B. The 1996 Act is Fundamentally Remedial, While the Sherman Act Defines Offenses That May Lead to Remedies

As the district court properly recognized, "the 1996 Act contains duties and obligations of affirmative assistance that 'go well beyond anything the antitrust laws would mandate on their own,'" Mem. 11 (A217) (quoting *Goldwasser*, 222 F.3d at 400), so that "merely pleading violations of the 1996 Act alone will not suffice to plead Sherman Act violations," *BellSouth*, 299 F.3d at 1283. Even if the antitrust savings clause of the 1996 Act did not bar imposition of new antitrust duties based solely on the requirements of the 1996 Act, recognition of such antitrust duties would still be inappropriate.

The 1996 Act "sought to bring competition to local-exchange markets, in part by requiring incumbent local-exchange carriers to lease elements of their networks at rates that would attract new entrants when it would be more efficient to lease than to build or resell." *Verizon*, 122 S. Ct. at 1687. Provisions of the Act, including those that lie at the core of Covad's alleged facts, "were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises; [an] objective . . . considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service." *Id.* at 1654. The Act was intended to "uproot[] the monopolies that traditional rate-based methods had perpetuated." *Id.* at 1660.

Section 2 of the Sherman Act also reflects congressional commitment to competitive markets, but approaches that commitment from an entirely different perspective, prohibiting conduct that monopolizes, rather than monopoly or monopoly power as such. 15 U.S.C. 2. "§ 2 does not prohibit monopoly *simpliciter* — or, as the Supreme Court phrased it . . ., 'monopoly in the concrete.'" *Berkey*, 603 F.2d at 273 (quoting *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911)). Thus, for example, a lawful monopolist is ordinarily free to charge a monopoly price, *e.g.*, *Berkey*, 603 F.2d at 274 n.12.

Similarly, the lawful monopolist may take advantage of other benefits associated with its monopoly; "an integrated business [does not] offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market." *Berkey*, 603 F.2d at 276. A lawful monopolist is under no obligation to provide equal access to its facilities so as to place its competitors "on 'as nearly an equal plane as may be,'" Br. 29 (quoting *Southern Pac. Communications Corp. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984), in turn quoting *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 411 (1912). That obligation is found in the remedial scheme, not the liability analysis, set forth by the Supreme Court in *Terminal Railroad*. 224 U.S. at 411. That case, which concerned whether a combination of terminal facilities resulted in a restraint of trade, *id.* at 394, involved no denial of access or use, *see id.* at 400 ("[t]hat other companies are permitted to use the facilities of the Terminal Company upon paying the same charges as the proprietary companies seems to be conceded"). Finally, a

monopolist generally may deal, or refuse to deal, with whomever it pleases. *See Aspen*, 472 U.S. at 600-03.

The 1996 Act places "obligations of affirmative assistance" on monopolists. In contrast, Section 2 imposes on a monopolist "no general duty to help its competitors . . . [and] no duty to extend a helping hand to new entrants." *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986). Section 2 is aimed at preventing, and remedying, conduct that improperly impedes competition with the monopolist. Absent such conduct, there can be no liability under Section 2. Once a violation has been established, however, courts appropriately turn to questions of remedy, and in a proper case a court may order relief that uproots the monopoly, *see Microsoft*, 253 F.3d at 103.

Under limited circumstances, a monopolist's refusal to deal with its actual or potential competitors may constitute exclusionary conduct, and its duty to deal in such situations may attract new entrants or otherwise increase competition. We do not suggest, therefore, that an ILEC's conduct with respect to a CLEC could never violate the Sherman Act. But neither the essential facilities doctrine nor any other antitrust doctrine establishes a duty to deal with competitors on whatever terms they find acceptable or profitable. *See Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542-45 (4th Cir. 1991) (access not denied when offered at a reasonable rate of $2.12/ton, one cent above defendant's variable costs, although any rate over $1.00 was more than plaintiffs "could profitably pay," because "the

reasonable standard of the access factor can not be read to mean the assurance of a profit").

When it amended the Communications Act in 1996 to promote local competition, Congress could simply have removed legal barriers to entry and relied on market forces and enforcement of the antitrust laws. Instead, Congress imposed new regulatory obligations on incumbents for the purpose of "giv[ing] aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon*, 122 S. Ct. at 1661. *See Goldwasser*, 222 F.3d at 399. It established duties of a sort not found in antitrust law, and left detailed specification and implementation of access standards and requirements to the Federal Communications Commission and the state regulatory commissions.

This Court and the FCC agree (as does the United States) that the FCC did not write the essential facilities doctrine into its regulations implementing the Act's local competition provisions. The 1996 Act required the Commission to determine which "network elements should be made available," and in doing so to consider, inter alia, whether failure to provide an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. 251(d)(2)(B). In defining its impairment standard, the FCC explicitly rejected suggestions that it base its standard "on an analysis similar to the one used by courts in determining whether, according to the essential facilities doctrine, a firm must share its facilities with competitors." *Implementation of the*

Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696, 3728, ¶ 57 (1999); *see also id.* at 3728-29, ¶¶ 58-60 (explaining rejection). This Court concluded that the FCC had created unduly broad new rights of access under the 1996 Act, and suggested that aspects of the essential facilities doctrine might provide guidance in a *narrower* implementation of the new regulatory access obligations — making clear that the FCC's implementation standard imposed duties broader than any that might be created by the essential facilities doctrine.[8] Thus both the Court and the FCC agreed that regulations promulgated under the 1996 Act did not embody the essential facilities doctrine.

Nor does failure to comply with the access requirements of the 1996 Act amount to a "denial of access" as that term is used in antitrust discussions of the essential facilities doctrine. Although the rates charged for unbundled network elements are but one aspect of the terms on which these elements are provided, they are a significant aspect of those terms and illustrate the differences between the requirements of the 1996 Act as implemented in regulations and the requirements of the Sherman Act.

Ratemaking for unbundled network elements under the 1996 Act is, like other aspects of the Act, intended "to achieve the entirely new objective of uprooting

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[8]As this Court viewed it in *USTA*, the essential facilities doctrine would not compel access to facilities unless, inter alia, "it would make *no economic sense* for competitors to duplicate the facility," 290 F.3d at 426. *Cf.* 3A Areeda & Hovenkamp ¶ 773, at 196 ("The strongest claims of essentiality are resources that constitute natural monopolies or those whose duplication is forbidden by law."). The Court found that the FCC's approach did not embody this concept. *USTA*, 290 F.3d at 426-27.

the monopolies that traditional rate-based methods had perpetuated," *Verizon*, 122 S. Ct. at 1660, or "to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers," *id.* at 1661. The Act therefore mandates "nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself." *Id.* (quoting 141 Cong. Rec. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub. L. 104-104 (1995)). The FCC, implementing the statute, defined the key statutory concept of "the cost . . . of providing the . . . network element," 47 U.S.C. 252(d)(1), as a "forward-looking economic cost," 47 C.F.R. 51.505 (2001), which it defined in turn as "the sum of (1) The total element long-run incremental cost of the element [TELRIC] . . .; and (2) A reasonable allocation of forward-looking common costs." *Id.* at 51.505(a). Moreover, "the FCC decided that the TELRIC 'should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers." *Verizon*, 122 S. Ct. at 1664 (quoting 47 C.F.R. 51.505(b)(1)). Finally, the rate actually charged to any particular entrant was to be in proportion to its projected actual usage of the element as compared to the projected usage by others, including the incumbent, *id.* at 1665 n.16, which means, in effect, that the monopolist and its competitor pay the same rate for the monopolist's facility, after adjusting for usage.

TELRIC prices have no particular significance for the essential facilities doctrine or other theories of Section 2 liability. Section 2 was not designed to give aspiring competitors "every possible incentive to enter" a market, *Verizon*, 122 S. Ct. at 1661, nor does it require that a monopolist's prices be limited to some measure of its costs, forward-looking or otherwise. Moreover, there is no general requirement that an integrated monopolist share equally with others the benefits resulting from association. Thus there is no Section 2 requirement that a monopolist and its competitor pay the same usage-adjusted rate for the monopolist's facility.

Given these fundamental differences between the 1996 Act and Section 2, proof of noncompliance with the 1996 Act, regulations thereunder, agreements negotiated in its shadow, or all three, does not in itself prove a Section 2 violation on an essential facilities theory or any other theory. A plaintiff claiming a violation of Section 2 would therefore have to establish the elements of a Section 2 violation by establishing far more than an ILEC's failure to comply with obligations that exist by virtue of the 1996 Act.

Covad's complaint alleges a lack of "legitimate or sufficient business justification" (Compl. ¶ 229 (A112)), and it further alleges injury to "competition in the relevant markets" (*id.* ¶ 232 (A112)), in conclusory terms. But the absence of more specific allegations with respect to the elements of a Section 2 violation — in particular, the existence of exclusionary or predatory conduct — is striking. We take no position on the sufficiency of Covad's complaint to survive dismissal, but we

urge that this Court make clear that liability may not be found in this case without proof of such conduct.

CONCLUSION

The Court should not affirm on the ground that the regulatory scheme established under the Telecommunications Act of 1996 requires dismissal of the antitrust claims.

Respectfully submitted.

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Dated: December 17, 2002

CERTIFICATE OF SERVICE

I certify that on this 17th day of December 2002, I caused two copies of the Brief for United States of America and Federal Communications Commission as Amici Curiae Supporting Neither Party to be served by Federal Express next day delivery on each of the following:

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